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Secretary

Federal Communications Commission

1919 M Street NW, Room 222

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: **Petition of Bell Atlantic Corporation, CC Docket No. 98-11**
Petition of U.S. West Communications, Inc., CC Docket No. 98-26
Petition of Ameritech Corporation, CC Docket No. 98-32
Petition of Southwestern Bell Telephone Co., et al., CC Docket No. 98-91

Dear Ms. Salas:

On behalf of the Internet Service Providers' Consortium (ISP/C), I am filing this written ex parte communication pursuant to Section 1.1206(a)(1) of the Commission's Rules. **This package includes an original and one copy for inclusion in each of the four dockets referenced above.**

Three of the petitioning RBOCs — Bell Atlantic Corporation (Bell Atlantic), U.S. West Communications, Inc. (U.S. West), and Ameritech Corporation (Ameritech) — seek authority to construct and operate interLATA facilities, in the form of Internet backbone networks, and to do so free of separation requirements and unbundling and resale obligations. All four petitioners — the same three plus Southwestern Bell Telephone Co., et al. (SBC) — seek to offer Asymmetric Digital Subscriber Line (ADSL) service free of unbundling and resale obligations, and SBC seeks relief from the tariffing and most-favored-nation rules as well.

SUMMARY

Internet Service Providers (ISPs) provide retail-level dial-up access to the Internet to anyone with a computer and a phone line. Without the ISPs, only businesses large enough to maintain their own networks could have Internet access. ISPs make the Internet universal and ubiquitous even for non-technical users.

An ISP uses multiple local loops on which customers dial in, and data lines for connection to the Internet backbone. Most ISPs do not have access to facilities-based CLECs, and so are wholly dependent on ILECs for local loops and data lines.

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The petitioning RBOCs are themselves in the ISP business — they compete with independent ISPs for the same retail Internet customers. The RBOCs thus have every incentive to use their facilities monopoly to discriminate against independent ISPs. An unconditioned grant of the petitions would give them the means to do so as well.

ISP/C urgently requests the Commission to qualify any grant of these petitions to make it harder for an RBOC to improperly suppress competition in the ISP retail market. Specifically:

- An RBOC that provides interLATA data services, including Internet backbone, should be required to offer the same services to independent ISPs on nondiscriminatory rates, terms, and conditions.
- An RBOC that offers xDSL services should be required to unbundle the service from its own ISP services and make xDSL available for connection to independent ISPs on nondiscriminatory rates, terms, and conditions.

These are the minimum steps necessary to ensure fundamental fairness in access to facilities, and hence to maintain a thriving, innovating market for ISP services. The language of these conditions may have to be framed in more specific terms, once the petitioners have disclosed in greater detail how they plan to configure their offerings. In the meantime, inclusion of the foregoing or similar language in any order granting the petitions would encourage the RBOCs to cooperate in working out the necessary specifics. These conditions need not impede the RBOCs' deployment of new technologies.¹ And, as shown below, they are fully consistent with the Communications Act.

■ ■ ■ ■

About the ISP/C. The ISP/C is the ISP industry's largest trade association for small to mid-size ISPs.² Founded in 1996, the ISP/C is an international organization of Internet service providers and other members of the Internet services industry. Its ranks include more than 220 company members, up 200 percent in the last year alone. ISP/C members provide local and backbone Internet access, online content, and hardware and software for the industry. Members are headquartered in more than 42 U.S. states and 10 countries, with over 1 million subscribers in the aggregate. Most members serve local or regional markets. Increasingly, members specialize in services for specific industries.

Although the ISP/C welcomes members regardless of size and geographic location, it has emerged as the voice for independent ISPs. These are ISPs *other than* carriers like the RBOCs, on-line content providers like AOL, and entities entangled with other interests, such as Microsoft Network.

¹ Indeed, U.S. West states that, "[i]f relief is granted, end users will be able to enjoy the full benefits of US WEST's expanded data services whether they subscribe to US WEST's internet access service or an unaffiliated ISP." U.S. West Petition at 5. The requested conditions would hold U.S. West to that promise.

² Additional information about the ISP/C is available at <http://www.ispc.org>.

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Between 5,000 and 7,500 independent ISPs operate in the United States today. About 85% are small businesses, and about 85% of their customers in turn are also small businesses. The independent ISPs have average revenues of about \$375,000, and most have fewer than ten employees. Collectively, however, these companies account for 50 percent of the U.S. ISP market.

The independent ISPs have helped to make the Internet the fastest-growing communications medium in the history of civilization. They contribute more than their share of the vitality and diversity that enables millions of people to use Internet daily to improve and enrich their lives.

A. The Requested Conditions Are Lawful and Reasonable.

Some of the petitioning RBOCs are imprecise as to the relief they request. So far as we can tell, Ameritech, Bell Atlantic, and U.S. West all ask the Commission to forbear from applying the Section 271 prohibition on interLATA transport, and the Section 272 requirement that any permitted interLATA services be provided through a separate affiliate. All four petitioners appear to request forbearance as to the Section 251(c)(3) unbundling requirement and the Section 251(c)(4) obligation to offer service to retail competitors at a wholesale discount. SBC further asks for relief from the tariffing obligations of Section 203 and the "most favored nation" provisions of Section 252(i).

Implicitly, however, the petitioners also ask for another category of forbearance. To the extent that they seek the right to bundle enhanced and basic services — Internet services with interLATA or xDSL transport — they are also requesting forbearance of the Computer III rules.

Complete relief from Computer III is not justified.³ To the contrary, the Commission adopted the Computer II/III regime to forestall precisely the abuse threatened here — discrimination against enhanced service providers, such as ISPs, by an RBOC that itself competes in the same enhanced services market. The risk of discrimination is even greater today, in view of increasing reliance on the Internet, than it was during the contentious debates over Computer II and Computer III. Indeed, the Commission recently issued a Notice that acknowledged the importance of Computer III to Internet services.⁴

³ U.S. West is the only petitioner to address this issue. U.S. West states that it does not request relief "at this time" from the Computer III Open Network Architecture rules. U.S. West Petition at 44 n.21. In the next breath, however, U.S. West asks the Commission to deny "pure" information service providers, which includes most independent ISPs, the right to obtain unbundled network elements. *Id.* at 44-45. Similarly, U.S. West commits to making xDSL available on equal terms to all ISPs, including U.S. West's own ISP, "subject to Open Network Architecture principles," *id.* at 51, yet it declines to unbundle xDSL. *Id.* at 48-51. We take these distinctions as examples of U.S. West's proposal to comply with Computer III but not with Section 251.

⁴ Computer III Further Remand Proceedings, 13 FCC Rcd 6040, 6087-88 (1998) (asking whether the Computer III Open Network Architecture regime is an effective means of giving ISPs access to conventional ILEC services).

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1. InterLATA data services.

The ISP/C has no position on the petitioners' request to relax the Section 271 interLATA prohibition as to **basic** high-speed data transport. But if an offering includes not only basic transport, but also enhanced Internet backbone services, then the RBOCs must not be allowed to provide those services to their own ISPs while denying them to competing ISPs on nondiscriminatory rates, terms, and conditions.

This condition merely restates the basic rationale of Computer III.

The requested condition also restates the principle of common carriage codified in Section 202: It is unlawful for a common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services," or "to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."⁵ When applied to the present facts, the plain meaning of these words shines through decades of accumulated commentary: An RBOC may not deny a vital service to a competing ISP, or overcharge for it, while providing that service to itself.

Alternatively, inasmuch as the Commission has authority under Section 271 to prohibit interLATA transport outright, it necessarily has jurisdiction to impose the far less drastic limitation of requiring equal treatment to competing ISPs.

2. xDSL Services

"xDSL" is a generic term for several technologies that deliver high-speed data services over the "last mile" from the RBOC's Central Office to the subscriber. These include ADSL (symmetric digital subscriber line), HDSL (high bit rate digital subscriber line), iDSL (integrated digital subscriber line), and RADSL (rate-adaptive asymmetric digital subscriber line). The various formats differ in their upstream-downstream speed capabilities and the distance spans over which they can operate, but there is no principled reason to regulate them differently.

The RBOCs must not be permitted to bundle xDSL with their own ISP services while denying access to xDSL for connection to competing ISPs. The result would be a market in which customers could obtain 1.5 megabit/sec Internet service from the RBOCs, but no better than 56K/sec from competing ISPs. That would quickly yield an ISP monopoly in the RBOCs — a monopoly obtained by improperly tying high-speed ISP services to the local loop monopoly.

This is precisely the outcome that Computer III seeks to avoid. Because xDSL is a basic service under the Computer II/III rules,⁶ the RBOCs are required to make it available for connection to competing ISPs under

⁵ 47 U.S.C. § 202(a).

⁶ A basic service is "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." Second Computer

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Computer III. Specifically, end users must be allowed to order xDSL to interconnect with independent ISPs under the same rates, terms, and conditions as they would connect to the RBOC's own ISP.⁷

B. The Conditions Requested Here Are Fully Consistent with the 1996 Act.

The conditions that ISP/C requests are not new. They are the law today, part of the legal mechanism that the petitioners seek to have forborne. The Commission need not promulgate new regulations in order to leave them in place.

Section 706, on which all of the petitioning RBOCs rely, instructs the Commission to

encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, **in a manner consistent with the public interest, convenience, and necessity**, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.⁸

Congress made regulatory forbearance expressly subject to the public interest, convenience, and necessity. In the 1996 Act, the public interest centers on promoting competition.⁹ The conditions requested here will unquestionably further that goal by promoting competition for ISP services, without hindering the deployment of

Inquiry, 77 F.C.C.2d 384, 420 (1980). xDSL also falls squarely within the 1996 Act definition of "telecommunications": "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

⁷ SBC appears to offer independent ISPs access to its xDSL service, SBC Petition at 21, but stops short of promising a nondiscriminatory offering. Moreover, SBC proposes to limit xDSL availability to ISPs that also subscribe to its high-speed packet service. *Id.* This is an unreasonable (and possibly illegal) condition to impose on competitors. Independent ISPs should be able to use xDSL for customer access while still interconnecting with any data network by any means of their choosing.

⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, § 796 (1996), *codified at* 47 C.F.R. § 157 note (emphasis added).

⁹ The full title of the statute is, "**An Act to promote competition** and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new communications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104 (preamble) (emphasis added).

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new technologies. It would be a sad irony if the Commission construed a statute enacted to foster competition in such a way that competition was imperiled.

Some of the petitioners also rely, in whole or in part, on Section 10 of the Communications Act.¹⁰ As U.S. West correctly notes, however, application of Section 10 to authorize forbearance of Section 251(c) or 271 is conditioned on the Commission's prior determination that those sections have been fully implemented.¹¹ None of the petitioners have yet implemented Section 271, and so Section 10 is inapposite to interLATA services.

Moreover, Section 10(a) permits the Commission to forbear from regulating only if (1) the regulation is unnecessary to ensure that the provision of service is just and reasonable, and not unjustly or unreasonably discriminatory, (2) enforcement of the regulation is not necessary to protect consumers, and (3) forbearance is in the public interest.¹² Subsection (b) explains that the public interest determination turns on "whether forbearance from enforcing the provision or regulation will promote competitive market conditions, **including** the extent to which such forbearance will enhance competition among providers of telecommunications services."¹³

With respect to the ISP market, the petitions fail all three tests. (1) Without the minimal conditions requested here, there is nothing to stop the RBOCs from discriminating unjustly and unreasonably against independent ISPs. (2) Consumers will be directly harmed by the resulting loss of competition in the ISP marketplace. (3) Although ISPs are not "providers of telecommunications services" under the public interest test of Section 10(b), there is no doubt that "competitive market conditions" would be harmed if the RBOCs had unfettered power to deny their competitors access to bottleneck services that they provide to their own ISP operations.

In short, the conditions that the ISP/C requests are wholly consistent with both the language and the intent of Sections 706 and 10.

C. Independent ISPs Need Protection Comparable to That Afforded to Other Industries Vulnerable to Discrimination by ILECs.

Industries other than ISPs are, like ISPs, simultaneously dependent on ILEC facilities and in competition with ILECs over those same facilities. These industries include CLECs, pay phones, voice mail, alarm monitoring services, electronic publishing, and interLATA enhanced services generally, and will likely come to include IXC services as well.

¹⁰ 47 U.S.C. § 160. U.S. West expressly disclaims reliance on Section 10. U.S. West Petition at 36 n.15.

¹¹ 47 U.S.C. § 160(d). *See* U.S. West Petition at 36 n.15.

¹² 47 U.S.C. § 160(a).

¹³ 47 U.S.C. § 160(b) (emphasis added).

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Unlike ISPs, however, each of the listed industries benefits from a provision of the Communications Act intended expressly to prevent the RBOCs from misusing their facilities monopoly to impede competition.¹⁴ The omission of ISPs from this list is no great mystery. The ISP industry barely existed in 1994 and 1995, when the Telecommunications Act of 1996 was being negotiated and drafted. In 1995 there were only about 750 providers, a group too small to have the economic clout needed to shoulder its way to the negotiating table. Were the Act drafted today, there can be no serious doubt that the ISP industry would receive protections comparable to those afforded other ILEC-dependent industries. In fact, the conditions that ISP/C seeks here are far more modest and less intrusive than the structural separation requirements Congress imposed to protect other industries in the 1996 Act.

Like other for-profit corporations, the RBOCs seek to maximize value for their shareholders. The RBOCs' natural course is to use the means at their disposal to increase their market share for ISP services. There is no reason to expect altruistic behavior toward their competitors. The RBOCs will not provide independent ISPs with nondiscriminatory access to the facilities at issue here unless the Commission requires it.

CONCLUSION

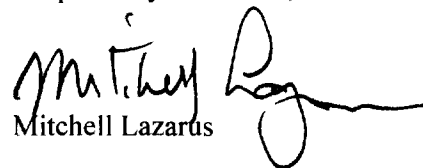
If the Commission grants the RBOCs' Section 706 petitions, it should protect the flourishing market for ISP services by insisting that the RBOCs give nondiscriminatory access by competing ISPs. Any other outcome would disserve the fundamental purposes of the 1996 Act.

■ ■ ■ ■

Kindly date-stamp and return the extra copy of this letter provided.

If there are any questions about this filing, please call me directly at the number above.

Respectfully submitted,


Mitchell Lazarus

ML:deb

cc: Carol Matthey, Esquire, Chief, Policy and Program Planning Division
Melissa Newman, Esquire, Deputy Chief, Policy and Program Planning Division
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Ms. Roxanna Loveday, ISP/C
Mr. Charles T. Smith, Jr., ISP/C

¹⁴ See 47 U.S.C. §§ 251-53 (CLECs), 260 (voice mail), 271 (interLATA services), 272 (a)(2)(C) (enhanced services), 274 (electronic publishing), 275 (alarm monitoring), and 276 (pay phones).